No. 85-1798 (5)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PENNZOIL COMPANY,

Appellant,

—against—

TEXACO, INC.,

Appellee.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR APPELLANT

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QUESTIONS PRESENTED

The judgment below, which authorized a federal district court to interfere with pending state court proceedings by enjoining recourse to the statutes a state has adopted for adjusting the competing interests of judgment winners and losers pending appeal, presents the following questions:

1. May a federal court treat an injunction of state court proceedings as "expressly authorized" by 42 U.S.C. § 1983, and therefore exempt from the Anti-Injunction Act, by transforming into "the state" every private litigant who invokes state judicial proceedings and may call on state officers to help enforce the resulting judgment?
2. Having declared that enforcement of a private litigant's state court judgment is actionable under § 1983, may a federal court avoid the comity principles of *Younger v. Harris* by declaring that the state has no cognizable interest in such enforcement proceedings inasmuch as the underlying action is between private parties?
3. Do *Younger* principles permit a federal court to excuse deliberate bypass of judicial remedies in a state's appellate system where there is no procedural bar to full and fair state court consideration of a litigant's constitutional challenges?
4. May a federal district court reward deliberate bypass of state judicial relief from alleged barriers to effective appeal of a trial court judgment by treating a federal suit seeking to stay that judgment pending appeal as "original" rather than "appellate" in nature, and therefore as exempt from the exhaustion requirements this Court respects in considering applications for identical stays?
5. May a federal court intervene in pending state court proceedings to invalidate the state's appellate security provisions on the theory that the Due Process Clause entitles a trial loser to an affordable stay of judgment pending appeal?

PARTIES TO THE PROCEEDING

In addition to the parties who appear in the caption of this case, the State of Texas appeared as Intervenor-Appellant in the court of appeals, pursuant to 28 U.S.C. § 2403(b). Pennzoil Company has no parent company or affiliates as those terms are used in Supreme Court Rule 28.1. Pennzoil's non-wholly-owned subsidiaries are:

National Transit Company

The Eureka Pipe Line Company

Proven Properties, Inc.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, dated February 20, 1986, is reported at 784 F.2d 1133, and is reprinted as Appendix A.* The opinion of the United States District Court for the Southern District of New York, dated January 10, 1986, is reported at 626 F.Supp. 250, and is reprinted as Appendix D.

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* The Appendices are bound together with the Jurisdictional Statement.

JURISDICTION

Texaco brought this action for injunctive relief in the United States District Court for the Southern District of New York under 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331, and 1343. The district court (Brieant, J.) granted a preliminary injunction on January 16, 1986, see Appendix B, against enforcement of certain Texas bond and lien statutes, on the ground, *inter alia*, that their application to Texaco would violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution. See Appendix D.* The United States Court of Appeals for the Second Circuit, affirming in part and reversing in part, sustained the injunction against the Texas provisions on due process grounds. See Appendix A. The judgment was entered on February 20, 1986, see Appendix F, and the mandate issued on March 13, 1986. Appellant's motion to recall the mandate and to clarify, modify or stay the judgment was denied by the Court of Appeals on March 27, 1986. See Appendix G. Appellant filed a timely Notice of Appeal to this Court in the United States Court of Appeals for the Second Circuit on March 21, 1986. See Appendix H. After remand, on April 8, 1986, the District Court entered an amended injunction barring enforcement of Pennzoil's Texas judgment until the completion of all appeals in Texas and to this Court under 28 U.S.C. § 1257. See Appendix C.

The Second Circuit, by affirming the grant of a preliminary injunction against Pennzoil, has conclusively held the Texas supersedeas bond and judgment lien provisions unconstitutional as applied, leaving no federal issue to be resolved below. This Court therefore has jurisdiction of this appeal under 28 U.S.C. § 1254(2). *City of New Orleans v. Dukes*, 427 U.S. 297, 302 (1976) (per curiam); *Chicago v. Atchison, T. & S.F.R. Co.*, 357 U.S. 77, 82-83 (1958).

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* The District Court's Supplemental Findings of Fact are set forth in Appendix E.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part that:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 28, § 2283 of the United States Code provides that:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

Texas Rule of Civil Procedure 364 provides:

> (a) *May Suspend Execution.* Unless otherwise provided by law or these rules, an appellant may suspend the execution of the judgment by filing a good and sufficient bond to be approved by the clerk, or making the deposit provided by Rule 14c, payable to the appellee in the amount provided below, conditioned that the appellant shall prosecute his appeal or writ of error with effect and, in case the judgment of the Supreme Court or Court of Appeals shall be against him, he shall perform its judgment, sentence or decree and pay all such damages as said court may award against him.
>
> (b) *Money Judgment.* When the judgment awards recovery of a sum of money, the amount of the bond or deposit shall be at least the amount of the judgment, interest, and costs.

Texas Property Code, § 52.001 provides that:

> A first or subsequent abstract of judgment, when it is recorded and indexed in accordance with this chapter, constitutes a lien on the real property of the defendant located in the county in which the abstract is recorded and indexed, including real property acquired after such recording and indexing.

Texas Const. Art. I, § 13 is reprinted as Appendix K.

42 U.S.C. § 1983 is reprinted as Appendix L.

28 U.S.C. § 1257 is reprinted as Appendix M.

Texas Govt. Code § 22.002 is reprinted as Appendix N.

Fed.R.Civ.P. 62 is reprinted as Appendix O.

IN THE

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No. 85-1798

PENNZOIL COMPANY,

Appellant,

—against—

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Appellee.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR APPELLANT

STATEMENT OF THE CASE

At issue in this case is the authority of federal district courts, notwithstanding the Anti-Injunction Act and judicially-crafted comity principles, to interfere with pending state court proceedings by enjoining recourse to the statutes a state has adopted for adjusting the competing interests of judgment winners and losers pending appeal.

The Texas state court trial.

Pennzoil Company sued Texaco Inc. in a Texas state court in February 1984 for intentionally inducing the breach of Pennzoil's binding agreement to acquire 3/7 of Getty Oil Company. In a 4-1/2 month trial, Pennzoil, in the words of the United States Court of Appeals for the Second Circuit (A41),[1]

1. Citations to pages in the appendices to the Jurisdictional Statement will be styled "A ____"; to Texaco's Motion to Affirm, "MTA ____"; and to the record appendix in the court of appeals, "CCA ____."

established to the satisfaction of a Texas jury and judge that it was unlawfully injured by Texaco's tortious conduct, that as a result Pennzoil suffered enormous damages, and that Texaco's conduct was sufficiently egregious to require it in addition to pay punitive damages to the victim.

The jury awarded Pennzoil compensatory damages of $7.53 billion, based on Pennzoil's evidence of what it would cost to replace the vast oil reserves that Pennzoil would have acquired under its lost agreement with Getty. (Texaco introduced no evidence on the issue of damages.) The jury also awarded $3 billion in punitive damages, bringing the total judgment entered on December 10, 1985, including prejudgment interest and costs, to $11.12 billion. (A126-27).

Texas law, like that of most states, provides that a party wishing to appeal from a money judgment "may suspend the execution of the judgment by filing a good and sufficient bond . . . ." Texas R. Civ. P. 364(a). To protect the rights of the prevailing party while the appeal is pending, Texas law, like that of 30 other jurisdictions,[2] provides that the bond equal "at least the amount of the judgment, interest, and costs," *id.* 364(b), "[u]nless otherwise provided by law," *id.* 364(a).

A judgment debtor may appeal in Texas even without posting a supersedeas bond, but the prevailing party may then take steps to enforce its judgment while the appeal is pending. In particular, the judgment creditor may record its judgment in any Texas county and thereby acquire a lien on any property of the judgment debtor located in that county. Texas Prop. Code Ann. § 52.001.

No such threat of immediate enforcement existed with respect to Pennzoil's judgment against Texaco, however (A38), for Paragraph 7 of the judgment included, with the consent of both parties, so-called "stand-still" provisions carefully balanced to protect the interests of both litigants. See Appendix I. These provisions prohibited Pennzoil from taking any steps to

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2. See n.44 *infra*.

enforce its judgment, and also barred Texaco from transferring or encumbering its assets except in the ordinary course of business, as long as the trial court retained jurisdiction of the case.

During this post-trial period, which lasted 3-1/2 months, through March 25, 1986, Texaco was free to seek further relief in the Texas trial and appellate courts from the appeal bond and judgment lien provisions of Texas law, but it made no attempt to do so. Indeed, to this day, Texaco has never raised in a Texas court its objections to the validity or reasonableness of the Texas bond and lien provisions. Nor has Texaco moved in the Texas courts to obtain suitable alternative security arrangements, notwithstanding the fact that, after the judgment was entered, Pennzoil filed a stipulation (Appendix J) in the Texas trial court waiving its right to a full bond and asking that court to fashion fair and suitable security under standards such as those contained in Fed.R.Civ.P. 62.

Texaco's federal district court action.

Several hours before the Texas court had even entered its judgment, Texaco, which had just given its consent to the stand-still provisions, filed this suit against Pennzoil in the United States District Court for the Southern District of New York (White Plains Division) (Brieant, J.). Purporting to rely on 42 U.S.C. § 1983, Texaco sought immediate appellate review in the federal district court of the merits of the Texas judgment, alleging that the judgment burdened interstate commerce, frustrated various provisions of the Securities Exchange Act, and violated the Full Faith and Credit and Due Process Clauses of the Constitution (Claims 1, 2, 4, 5, and 7). (A5, A11, A57-58). Texaco also alleged that the Texas bond and lien provisions violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment and deprived Texaco of its federal right of access to this Court under 28 U.S.C. § 1257. (Claims 3 and 6). Texaco asked the district court in White Plains (a) to invalidate these wholly conventional security provisions, (b) to decide for itself what would be suitable

security, and (c) to impose these arrangements on the Texas litigants and the Texas courts by means of an injunction.

On December 17, 1985, Judge Brieant issued a temporary restraining order, and on January 16, 1986, he entered a preliminary injunction prohibiting Pennzoil from "taking any action of any kind whatsoever to enforce or attempt to enforce" its Texas judgment. (A52). The district court ruled that every one of Texaco's claims "raise[d] serious questions" about the "merits of the [Texas] judgment" (A63), that Texaco was likely to be successful in its Texas appeal (A62, A66), that punitive damages should not have been awarded (A64), and that compensatory damages "should in no event exceed $800 million" (A66). The court also held that the Texas statute requiring a supersedeas bond in the full amount of the judgment was unconstitutional as applied to Texaco because it burdened Texaco's right to appeal to the Texas appellate courts and to this Court under 28 U.S.C. § 1257. (A70-71). The district court, concerned that "other creditors of Texaco will . . . run into the courts seeking to perfect security interests higher than that . . . available to Pennzoil" (A77), held that, whatever the size of the appropriate judgment, it "must be secured by assets or obligations at least equal in value. . . ." (A77). Yet because it found the Texas award of damages to be "absurd" (A65), the district court required Texaco to post security of only $1 billion as a condition for injunctive relief (A78), and otherwise left Texaco free to transfer or encumber the assets upon which Pennzoil would have to rely to collect its judgment.

The decision below.

On February 20, 1986, having heard Pennzoil's appeal, the Second Circuit directed dismissal of all of Texaco's claims other than those attacking the Texas lien and bond provisions (Claims 3 and 6), holding that all but those two claims could not be adjudicated by the lower federal courts since they had been litigated in the Texas courts. (A19-20). The court of appeals ruled that district court consideration of these claims

would constitute an impermissible arrogation of appellate power: "reviewability of these claims by the Texas appellate courts and ultimately by the Supreme Court pursuant to 28 U.S.C. § 1257 precludes an inferior federal court from exercising jurisdiction over them." (A20).

But the Second Circuit reached a different conclusion with respect to Texaco's Claims 3 and 6—the claims challenging the Texas bond and lien provisions. The court reasoned that Texaco's deliberate decision *not* to raise the question of the validity of these provisions in the Texas state courts gave Texaco the right to raise that question in a federal court. (A21). It stated that cases such as *Monroe v. Pape*, 365 U.S. 167 (1961), and *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982)—holding that a *plaintiff* with a constitutional claim under § 1983 may, as an original matter, choose to bring a federal action rather than sue in state court—also give a *defendant* in a *pending* state court proceeding the option to carve out federal issues and take them to the "concurrent" jurisdiction of a federal court. (A21-22). This is permitted, the court concluded, whenever a state court litigant decides *not* to submit to the state courts the issue of the validity of any state rule that is not "inextricably intertwined" (A22) with claims that have been adjudicated in the state courts.

The Second Circuit held that the Anti-Injunction Act, 28 U.S.C. § 2283, was likewise no bar to Texaco's Claims 3 and 6, because these claims were properly brought pursuant to 42 U.S.C. § 1983. Relying upon *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), the court below declared that Pennzoil would be acting "under color of" state law if it ever tried to enforce its judgment or obtain security therefor, because those acts "necessarily involve[ ] a panoply of activities undertaken together by Pennzoil and state officials, which constitute joint action for the purposes of § 1983." (A26).

On the other hand, the court of appeals ruled that, although there was "an on-going state proceeding" (A32), the principles of federalism and comity underlying *Younger v. Harris*, 401 U.S. 37 (1971), did not prevent the district court from issuing an injunction against Pennzoil. For the Second Circuit ruled

that Pennzoil—even though held to be an arm of the state for "state-action" purposes—was, for *Younger* purposes, merely a "private litigant" and its dispute with Texaco merely "a suit between two private parties" (A34). An injunction against Pennzoil thus did not prevent action by "any arm of the state" (A34); and neither Texas' interest in "protecting the rights of its citizens to obtain and enforce judgments in the Texas Courts," nor its "interest in the constitutionality of its statutes," was "important" or "substantial." (A32). Moreover, the court reasoned that "an injunction would not adversely affect the operation of the Texas judicial system but, on the contrary, would facilitate its proper functioning by permitting Texaco's appeal to be heard and decided." (A14).

The Second Circuit further held that abstention was not required because, in its opinion, the Texas state courts do not provide "adequate procedures for adjudicating Texaco's federal claims" (A35). Without even addressing most of the Texas avenues of redress pressed by both Pennzoil and the State of Texas, which intervened on Pennzoil's side below (A1, A3), and without identifying a procedural bar to such adjudication, the court simply opined that "[t]here is no assurance" that the Texas appellate courts would grant Texaco an "immediate stay of execution" pending a ruling on the federal claim, nor that they would fix security in an amount that the court of appeals would deem "reasonable." (A37-38).

As to the merits of Texaco's attack on the Texas lien and bond statutes, the Second Circuit concluded, in effect, that the Due Process Clause entitles a civil judgment debtor such as Texaco to an affordable means of staying execution of the judgment against it while pursuing its appeal. The court below thus held that the Fourteenth Amendment prohibits Texas from balancing the needs of trial winners and losers as it sees fit, and from deeming the completion of trial an appropriate occasion for fully securing the winning party against the risk that its victory might prove worthless if and when the trial court's judgment is ultimately affirmed on appeal. The Second Circuit accordingly "declare[d] the Texas lien and bond provisions to be unconstitutional . . . as applied" (A35): "[D]enial

of a stay of execution unless a supersedeas bond in the full amount of the judgment is posted . . . [would] amount[ ] to a confiscation of the judgment debtor's property without due process . . . [and] reduce its appeal to a meaningless ritual[,] [s]ince Texaco would be bankrupt or in liquidation by the time its appeals were decided . . . ." (A44). The Second Circuit proceeded to affirm the district court injunction prohibiting Pennzoil from taking *any* steps in the Texas courts to facilitate the enforcement of its judgment (A47-51), whether by invoking the lien and bond provisions, or by requesting other forms of protection to preserve the status quo.[3]

On March 21, 1986, contending that the decision below threatened to make its state court judgment uncollectible, Pennzoil moved the court of appeals to clarify, modify, or stay its judgment so that Pennzoil would at least be free to ask the Texas courts to extend the Texas trial court's "stand-still" order (see pp. 2-3 *supra*) or otherwise to seek security in Texas apart from the Texas lien and bond provisions. The court of appeals denied this motion on March 27, 1986. See Appendix E.

SUMMARY OF ARGUMENT

The judgment of the court below sanctions an unprecedented intrusion by a federal court into ongoing state court proceedings, breaching the wall of statutes and judicial doctrines erected by Congress and this Court as a barrier to just such intrusions. Despite that barrier, the Second Circuit ruled that a federal district court in New York may entertain a collateral attack on the validity of the application, in a Texas lawsuit, of Texas statutes governing security arrangements

3. Having affirmed federal intervention in Texas judicial proceedings and having sustained the $1 billion bond ordered by the district court, the Second Circuit stated that further proceedings in the district court were "unnecessary" pending the disposition of the Texas appeal. (A48). The district court was to retain jurisdiction solely for the purpose of ruling on "any application with respect to the security terms of the injunction arising out of changed circumstances." (A51).

pending the appeal being pursued in that suit. The court held that the district court may displace those statutes and decide for itself what security is "reasonable" to protect the Texas judgment that Pennzoil won before a Texas jury and judge. The court of appeals turned the law on its head by insisting that the New York federal courts have this authority *because* Texaco deliberately bypassed the state courts and declined to present its constitutional objections in the ongoing Texas litigation.

The district court in White Plains has thus been given carte blanche to supplant the courts of Texas and to exercise continuing supervision over *pendente lite* security arrangements throughout the Texas litigation—preventing Pennzoil, on pain of contempt, from pursuing *any* remedy in *any* Texas tribunal to protect its existing and—unless and until reversed—wholly valid Texas judgment. The Second Circuit accomplished this intrusion by constructing a contrived complex of exceptions to *all* of the statutory and judicially elaborated comity rules that, in combination, embody the overarching principle that the state and federal judicial systems are independent and parallel, both subject to the governance of this Court, but without power—apart from exceptional and rigorously cabined circumstances—to supervise or interfere with each other's proceedings.

The court of appeals first ruled that every state-court judgment winner becomes "an arm of the state" whenever there is any prospect that the state's judgment enforcement machinery will actually be engaged. The court below thus radically expanded the application of 42 U.S.C. § 1983 to the private sector, while simultaneously contracting the application of the Anti-Injunction Act (28 U.S.C. § 2283)—the statute through which Congress, ever since 1793, has voiced its steadfast insistence that the federal courts not interfere with state court proceedings.

Then, in an abrupt about-face, the court of appeals took out of play the judicially-crafted rule of comity expounded in *Younger v. Harris*, on the ground that Pennzoil, having just been ruled a state actor for § 1983 purposes, is magically

transformed into a purely private actor for *Younger* purposes. The court thereby created a capacious zone within which comity is simply inapplicable because *neither* § 2283 *nor* abstention is operative—the former because the federal action seeks relief under § 1983 against a state-court litigant who is deemed to wield the power of the state, and the latter because that same state court litigation is nevertheless said to involve merely private parties and private interests and therefore to be undeserving of comity.

The Second Circuit compounded its corruption of abstention doctrine by excusing Texaco from having to identify any procedural bar preventing it from raising its constitutional objections to the lien and bond provisions in the pending Texas proceedings. Instead, the court below satisfied itself with pessimistic forecasts about how Texas courts would resolve questions that have never been put to them. But there is no reason whatever to assume that the Texas courts, especially in light of the "open courts" guarantee of the Texas Constitution, would have been any less sensitive than the federal judiciary to Texaco's legitimate concerns, or that travelling to a federal court half a continent away represents a more rapid or certain path to a just outcome than would have been available in the Texas judicial system. This Court's decisions permit no such distrust and disdain for state courts as fora fully willing and able to vindicate federal rights.

If Texaco *had* presented in the state courts its constitutional arguments against the lien and bond provisions, then—as the court of appeals of course had to acknowledge—the only federal forum in which Texaco could seek relief from an adverse state ruling would be *this* Court, acting on direct review under 28 U.S.C. § 1257, or a single Justice, granting a stay under 28 U.S.C. § 1651(b) pending the full Court's consideration under § 1257 of a petition for certiorari or an appeal. To avoid the conclusion that the federal district court simply lacked original jurisdiction to issue the stay pending appeal that Texaco sought—in effect, a stay in aid of the appellate jurisdiction of the Texas judiciary or of this Court or both—the court of appeals focused on the fact that Texaco had

carefully *avoided* ever asking the state courts to rule on its constitutional objections to the state lien and bond rules. In this way, the Second Circuit managed to conclude that Texaco's deliberate bypass of the Texas state courts *affirmatively justified* Texaco's excursion to the federal courts, rather than constituting a decisive obstacle to the exercise of federal jurisdiction. What should have been vice thus became virtue: the very same failure to exhaust state procedures and appeals that would have denied Texaco access to this Court on *direct* review, was viewed by the Second Circuit as providing Texaco a privileged entree to a federal district court in a *collateral* attack under § 1983. Even though the ultimate federal statutory right the court below claimed to be vindicating was access to this Court under § 1257, it saw nothing inconsistent or impermissible in allowing Texaco to petition a district court, rather than this Court, for injunctive relief in aid of *this Court's* appellate jurisdiction. Whether or not this Court construes its holdings in *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), as literally ousting the district court of all original jurisdiction to stay state court judgments in supposed aid of appeals therefrom, no appreciation of the comity principles lying behind those decisions can accommodate the end-run sanctioned by the court below.

The Second Circuit was comforted by its belief that its intrusion into state proceedings was *surgical* in both senses of the word: first, that it was narrow, precise, and limited to the "unique and extraordinary" circumstances of this case, unlikely ever to be repeated; second, that it was intended for the benefit of the patient, inasmuch as federal intervention here improved, rather than disrupted, the operation of the state judicial process.

But what the Second Circuit and Texaco believe makes this case unique is in fact something that has yet to occur at all: a flat insistence by Texas on rigidly enforcing the state's lien and bond rules in the face of an objection *in its courts* as to the supposedly dire results and constitutional iniquity of doing so on facts like these. The point Texaco cannot be permitted to

obscure is that Texaco has *never* given the courts of Texas a chance even to *consider* Texaco's claims, state *or* federal, against such rigid enforcement. Indeed, the *more* this situation can be fairly characterized as unique, the *less* justified is the unsubstantiated assumption—an assumption central to both the decision below and to Texaco's entire case for federal intervention—that the Texas courts would mechanically apply various state rules to these facts, oblivious of Texaco's federal constitutional objections to the state's rules as so applied.

What cannot be deemed unique to this case is the practice of endorsing federal "flanking movement[s] against the system of State courts," *Stefanelli v. Minard*, 342 U.S. 117, 123 (1951)—a practice that, if warranted on these facts, must be deemed warranted in a wide range of situations. It would be unprincipled and lawless to permit the court below to excuse its departure from precedent by saying, in effect, "only for Texaco." And it would be imprudent to suppose that other "exceptions" will not be made for other litigants.

Nor are the Second Circuit's good intentions any justification for displacing state tribunals as guardians of their own appellate processes. It is condescending to presume that state courts are in need of such strong medicine, and insensitive to suppose that federal district courts should feel free to make a state's judiciary swallow such a bitter pill.

Apparently displeased by what it deemed to be an excessive award of damages against Texaco, and aghast at what it imagined to be the prospect of Texaco's imminent collapse and the consequence of widespread economic distress, the court below promoted the virtues of quick action, brushed aside the principles of comity, and reacted to imagined calamities that either need never occur at all or, if they are to occur, inhere in the very magnitude of Texaco's adjudicated wrong and in the very fact of *ever* enforcing the resulting verdict in Pennzoil's favor. But tomorrow, when the shouting and the tumult have died, when the dust raised by this elephantine corporate struggle has settled, and when the billion-dollar figures and other technicolor facts have become the stuff of arbitrageur's anecdotes and litigator's war stories, we will still be a union of fifty

sovereign states, with parallel federal and state court systems. And, if the Second Circuit is not reversed, the damage inflicted on our federalism by this decision will then be painfully apparent and all too permanent.

ARGUMENT

I. THE ANTI-INJUNCTION ACT FORBIDS ENJOINING PRIVATE LITIGANTS FROM TAKING STEPS TO ENFORCE JUDGMENTS THEY HAVE WON IN STATE TRIALS.

For nearly two centuries the Anti-Injunction Act has provided that a federal court may not enjoin state court proceedings "except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. The Act is a linchpin of federal-state judicial relations, for "[o]bviously this dual system could not function if state and federal courts were free to fight each other for control of a particular case." *Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 286 (1970). The "lines of demarcation" contained in the Act are designed to permit each court system to function "independently of the other with ultimate review in this Court of the federal questions raised in either system." *Id.* The effectiveness of the Act, and thus the integrity of the dual court system, are jeopardized by the Second Circuit's decision in this case.[4]

The Second Circuit held the Anti-Injunction Act inapplicable on the ground that Texaco's due process claim against Pennzoil constituted an action authorized by 42 U.S.C. § 1983 and therefore, under this Court's ruling in *Mitchum v. Foster*,

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4. Although the injunction issued in this case was directed solely against Pennzoil, the Anti-Injunction Act—like the application of *Younger* abstention principles—"cannot be evaded by addressing the order to the parties or prohibiting utilization of the results of a completed state proceeding." *Atlantic Coast Line R.R. Co., supra*, 398 U.S. at 297.

407 U.S. 225 (1972), an action in which an injunction is "expressly authorized by Act of Congress." By this holding, the court below effected an unprecedented expansion in the application of § 1983 to private defendants and thereby undermined the command of the Anti-Injunction Act.

A. The Holding Below Makes Every Judgment Winner A State Actor Suable Under § 1983.

For Texaco's federal action to qualify as a § 1983 action, and thus one exempted from § 2283 under *Mitchum v. Foster*, Pennzoil must be deemed "a person who may fairly be said to be a state actor." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). Relying on *Lugar*, the court of appeals held that Pennzoil fits into this category because, in order to enforce its judgment, "Pennzoil would have to act jointly with state agents by calling on state officials to attach and seize Texaco's assets." (A25).

This conclusion radically expands this Court's holding in *Lugar*—itself a decision that had extended the state-action concept. *Lugar* sustained a § 1983 claim against a private party who had invoked a state *pre*judgment attachment statute before *any* judicial proceedings had occurred in the case. The *Lugar* majority repeatedly stressed that the private party's joint action with state officials in that case involved a *pre*judgment attachment procedure, 457 U.S. at 927, 927 n.6, 932, and thus the judicially *un*supervised seizure by an *alleged* creditor of "*disputed* property," *id.* at 933, 941 (emphasis added); the Court twice expressly stated that its holding "was limited to the particular context of prejudgment attachment." *Id.* at 939 n.21; *see id.* at 942.

In equating Texas' *post*-judgment, *post*-jury trial appellate security procedures with *Lugar*'s *pre*-judgment, *pre*-trial, *ex parte* attachment procedures, the Second Circuit ignored the central principle that prevents *Lugar* from being distorted into an all-purpose doctrine transforming *every* state-court judgment winner who seeks enforcement into "the state." When the state delegates to a private person the unbridled power to

interfere with others' property *before* there have been *any* judicial proceedings whatever, exercise of that power is appropriately subjected to the constitutional constraints that bind "the state."[5] But where a private person merely asks the state to help enforce a judgment duly rendered by a jury and confirmed by the trial court, a holding that that private person has become the state simply because he has invoked normal state procedures completely obliterates the distinction between private and state action.

The critical line is between a state delegation permitting private parties "to substitute their judgment for that of [a] state official or body," *Cruz v. Donnelly*, 727 F.2d 79, 82 (3d Cir. 1984), and a system that allows a private person to invoke public power only after the state has *itself* determined the relevant rights and liabilities. The Second Circuit reasoned that, since "state officials can act only upon Pennzoil's unilateral determination" to collect damages from Texaco (A28), this is not a case in which "the independent judgment of the state judiciary is called into play" (A27-28).

But surely the 4-1/2 month trial that preceded the entry of Pennzoil's judgment involved "the independent judgment of the state judiciary," and this is where the contrast with *Lugar*—and the Second Circuit's error—could not be more plain. The state-court plaintiff in *Lugar* was a state actor because state law abdicated to him the unilateral and unsupervised power to determine, simply by filing a complaint and an *ex parte* attachment petition, *see* 457 U.S. at 924, both that a debt was owed and that security therefor was required pending trial. Pennzoil wields no such power. The determination that Texaco owes Pennzoil damages was made by a judge and jury after a full trial; the decision presumptively to require security for all such judgments was made by the Texas Legislature

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5. *Lugar* thus falls within the line of cases including *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), *Lynch v. Household Finance*, 405 U.S. 538 (1972), and *Fuentes v. Shevin*, 407 U.S. 67 (1972), which hold that the Due Process Clause requires a fair opportunity to be heard in connection with private creditors' resort to prejudgment attachment, garnishment and replevin procedures.

when it enacted § 52.001 and by the Texas Supreme Court when it promulgated Rule 364; and the decision whether to require full security on these facts would be made by the Texas courts upon Texaco's timely request.[6] The suggestion that Pennzoil is here exercising unsupervised and unilateral official state power can be advanced, therefore, only by completely and artificially severing the issue of arranging security pending appeal from the judicial process culminating in the judgment being appealed.

Under the Second Circuit's reasoning, all trial winners who may at some point seek to enforce their judgments become state actors fully subject to the constraints of the Due Process and Equal Protection Clauses and vulnerable to suit under § 1983 with respect to any constitutional claims that can be conjured by disgruntled trial losers. That approach to state action clashes with this Court's basic teaching in *Dennis v. Sparks*, 449 U.S. 24, 28 (1980): "merely resorting to the courts and being on the winning side of a lawsuit" does not make a private party into a state actor under § 1983, any more than merely filing a complaint does. *Accord*, *Lugar*, *supra*, 457 U.S. at 939 n.21.

B. So Sweeping a View of § 1983 Cannot Have Been Contemplated by *Mitchum v. Foster.*

By vastly expanding the application of § 1983 to private conduct, the holding below retroactively pumps new meaning into the exemption authorized by *Mitchum v. Foster* and thereby drastically erodes the force of the Anti-Injunction Act.

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6. A winning plaintiff like Pennzoil, which the Second Circuit credits with "unilateral" power to make "state officials do [its] bidding" (A28), in truth wields no independent power under Texas law. Pennzoil's role in enforcing its judgment against Texaco is limited to asking the Texas court for a writ of execution and delivering it to a sheriff (*see* A25)—a fact that Texaco concedes. (MTA 1 n.2). And Pennzoil's role in perfecting judgment liens against Texaco is likewise limited to obtaining an abstract of the trial court's judgment from one court clerk and handing it to another for recording and filing (*see* A26)—which Texaco also concedes. (MTA 2 n.3).

That Act by its very terms comes into play only where state judicial proceedings have been instituted. But if the invocation of state judicial proceedings transforms a private litigant into a state actor whose conduct may be challenged under § 1983, then § 2283 will be cannibalized. Even if the Second Circuit's ruling is limited to state-court judgment winners, the result will be to render § 2283 inoperative with respect to federal court interference with state post-trial and appellate processes. Surely that is not what this Court contemplated when it decided *Mitchum v. Foster*, which was a real § 1983 action against a real government officer whose official activities constituted the sort of action at the core of Congress' concern when it "expressly authorized" injunctive relief under § 1983.

In moving that the judgment below be summarily affirmed, Texaco sought to assure this Court that the Second Circuit's state action holding "has *no* impact on the breadth of the § 1983 exception to the Anti-Injunction Act," inasmuch as Texaco *could* have chosen to seek a § 1983 "injunction . . . against the state officials involved in the proceeding." (MTA 19) (original emphasis). Why, then, *didn't* Texaco take that path? Obviously, Texaco sued Pennzoil *instead* of any state official in an attempt to avoid *Younger v. Harris*, 401 U.S. 37 (1971), which would have blocked Texaco's federal foray had it sued "any arm of the state." (A34). *Only* the Second Circuit's expansion of the state action concept enabled it to drive a wedge between the Anti-Injunction Act and *Younger*, creating the opening through which Texaco obtained federal relief *pendente lite*. Nor can the Court derive any comfort from Texaco's astounding suggestion that this case is "narrower than *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982)," because "this is solely an injunction action, not a suit for damages" (MTA 20). Texaco has obviously missed the point of the Anti-Injunction Act. That statute has restrained federal power ever since 1793 precisely because *injunctive* interference in state proceedings is the *most* intrusive form of federal invasion.

When asked to expand the coverage of § 1983, courts must consider what the expansion would do to the policies animating the Anti-Injunction Act. Such consideration is entirely

missing from the analysis of the court of appeals. The decision below entices state court judgment losers to mount collateral federal attacks on state court procedures regulating the enforcement of state judgments and other aspects of the state appeal process, thereby ceding to the lower federal courts a large and wholly unjustified zone within which to enjoin pending state proceedings.[7]

II. IN ANY EVENT, THE PRINCIPLES DEVELOPED BY THIS COURT UNDER *YOUNGER v. HARRIS* BAR FEDERAL INTERFERENCE IN PROCEEDINGS DESIGNED TO ASSURE THE COLLECTIBILITY OF STATE COURT JUDGMENTS WHERE SUCH PROCEEDINGS OFFER AN ADEQUATE FORUM FOR THE LITIGANT'S FEDERAL CLAIMS.

Even if the Anti-Injunction Act were held not to bar the injunction issued at Texaco's behest, the "national policy forbidding federal courts to stay or enjoin state proceedings except under special circumstances" would compel the same result here. *Younger v. Harris*, 401 U.S. 37, 41 (1971). In *Mitchum v. Foster*, *supra*, this Court unanimously held that the fact that a case is brought under § 1983 (and thus is exempt from the restrictions imposed by § 2283) does not "qualify *in any way* the principles of equity, comity and federalism that

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7. The breadth of the injunction affirmed below illustrates the range of federal judicial intrusions portended by the Second Circuit's holding. That injunction enjoins Pennzoil from going to the courts of Texas for *any* form of protection of its interests during the pendency of Texaco's appeal on the merits—even a mere extension of the bilateral stand-still that expired on March 26, 1986. *See* Appendix E. Yet the *only* exception to § 2283 even *suggested* in this case—§ 1983—bears *at most* upon the injunction against the lien and bond provisions, the only Texas laws ever challenged by Texaco. Any bootstrap plea for jurisdiction over *unchallenged* Texas procedures as a means of effectuating the judgment against those that were challenged is powerful evidence that Texaco's purported § 1983 claim against the bond requirement is nothing more than a subterfuge for a collateral federal attack on the Texas judgment itself, resting on undifferentiated disdain and hostility toward the Texas judiciary.

must restrain a federal court when asked to enjoin a state court proceeding." 407 U.S. at 243 (emphasis added). Such federal judicial "abstention is based upon the theory that the [would-be federal plaintiff] 'should first set up and rely upon his defense in the state courts, even though this involves a challenge of the validity of some statute, unless it plainly appears that this course would not afford adequate protection.' " *Middlesex Ethics Comm. v. Garden State Bar Assn.*, 457 U.S. 423, 435 (1982). The Second Circuit's embrace of the challenges that Texaco has steadfastly refused to present in the courts of Texas is anathema to the principle of comity.

A. *Younger* Abstention Cannot Be Escaped In A § 1983 Action By Suing A Private Litigant Rather Than A State Official.

Central to the Second Circuit's effort to escape *Younger* was the court's ruling that the Texas litigation, being a purely "private" dispute, simply did not involve state interests of a sort that might implicate *Younger*. After classifying Pennzoil as a "state actor" (A27) under § 1983 in order to evade the strictures of the Anti-Injunction Act, the Second Circuit thus changed its mind—and thereby changed Pennzoil's stripes—in an effort to evade *Younger* abstention: it now appeared that no "state official" of any kind was involved in the state court litigation in question (A33). Having previously declared that, for purposes of §§ 1983 and 2283, "Pennzoil cannot be divorced from [the Texas] enforcement procedure merely because a court authorized execution of the judgment" (A26), the court below proceeded to divorce Texas itself from its own enforcement procedures by holding that "the state has no interest in the underlying action" in this case (A34).

The court of appeals, by creating a zone within which *all* rules of comity are rendered entirely inoperative, made nonsense of the law. If Pennzoil is to be deemed "the state" for § 1983 purposes when it seeks to invoke particular state judicial mechanisms, this must be *because* it is a surrogate wielding the *public* powers of the state. But if the public powers of the

state are in fact implicated, *Younger* concerns come into play *for that very reason*: the point of the *Younger* doctrine is to prohibit federal interference with efforts by state courts to effectuate the state's public policies, except in narrowly defined extraordinary circumstances. *Younger* rests on the "belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." 401 U.S. at 44. To conclude, as the court below did, that a § 1983 action aimed at displacing the state judicial process for securing a duly-rendered judgment is so "private" that it escapes *Younger* is a contradiction in terms: *by definition* a § 1983 action is an action against *public* authorities to curb the exercise of *public* power—power "under color . . . of state law." For that very reason, sensitivity to concerns of comity becomes imperative.

Apart from the Second Circuit's inconsistent parsing of "state actors" and "private litigants," its refusal to apply *Younger* principles disregarded both the specific holdings and the animating philosophy of this Court's cases in the *Younger* line. The court of appeals gave a narrow and wooden interpretation to prior abstention precedents despite this Court's express admonition that "the principles of *Younger* and *Huffman* are not confined solely to the type of state actions which were sought to be enjoined in those cases," *Juidice v. Vail*, 430 U.S. 327, 334 (1977). The "vital consideration" underlying *Younger* and its progeny is the "notion of 'comity,' that is, a proper respect for state functions," *Younger*, 401 U.S. at 44, "which counsel[s] against interference by federal courts, through injunctions or otherwise, with legitimate state functions, particularly with the operation of state courts." *Trainor v. Hernandez*, 431 U.S. 434, 441 (1977).

Thus, in *Juidice v. Vail*, *supra*, this Court applied *Younger* abstention to a federal plaintiff who was, like Texaco, a state court judgment debtor. There, as here, the judgment was entered in a *purely private* civil lawsuit. There, as here, the federal claim was a § 1983 action challenging state laws and procedures enabling a successful plaintiff to protect his interest in the judgment—in that case, by moving for contempt in the

event the adjudged debtor failed to honor a privately-issued subpoena to appear for a privately-taken deposition about the existence of assets sought in satisfaction of the judgment. 430 U.S. at 329-30.

The Second Circuit's conclusion that "[h]ere the state has no interest in the underlying action" (A34) would have been just as apt—or inapt—in *Juidice*, where New York had no particular interest in the private financial dispute underlying the privately-taken deposition and the privately-issued subpoena. But just as New York had a substantial interest—one requiring federal abstention—in "civil contempt proceedings . . . initiated by private parties to enforce compliance with subpoenas issued by private attorneys," *Vail v. Juidice*, 406 F.Supp. 951, 958 (S.D.N.Y. 1976), so Texas has a vital interest in the functioning and enforcement of its bond and lien laws, "process[es] through which [it] vindicates the regular operations of its judicial system," *Juidice v. Vail*, 430 U.S. at 335. Texas' *pendente lite* security scheme, like New York's privately-initiated contempt process, exists to make state court judgments collectible: it "stands in aid of the authority of the judicial system, *so that its orders and judgments are not rendered nugatory.*" *Id.* at 336 n.12 (emphasis added).[8]

Pennzoil does not contend that Texas has any special interest in this particular judgment or in the underlying dispute between Pennzoil and Texaco. Rather, the "state's substantial interest in th[is] litigation" arises from the "[p]roceedings necessary for . . . the functioning of the state judicial system." *Middlesex Ethics Comm.*, 457 U.S. at 432. Surely Texas' judicial procedures for accommodating the competing interests of judgment debtors and creditors pending appeal serve a

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8. Texaco itself concedes that "a state court has 'inherent power to use its processes to induce compliance with a supplemental order reasonably issued in aid of execution.' " (MTA 12 n.22) (quoting *Nat'l Union of Marine Cooks & Stewards v. Arnold*, 348 U.S. 37, 44 (1954)). In the *Marine Cooks* case, where dismissal of a state appeal for failure to post proper security was upheld as a means of "sustaining the effectiveness of a state's judicial process," 348 U.S. at 45, this Court noted the importance of a state's interest in averting "frustration" of its judgments, *id.* at 44.

"legitimate state function," *Trainor v. Hernandez*, 431 U.S. at 441. How to order those countervailing interests—and how best to adjust a generic statutory rule to unusual circumstances—are issues in which the State of Texas, as well as the parties in any given case, has a very significant interest.[9] And equitable principles of comity and federalism "are designed to allow a State an opportunity to 'set its own house in order' " when the federal issue can be raised and resolved in pending state proceedings. *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 479-80 (1977).

The court of appeals opined that to allow *Younger* to operate here "would broaden *Younger* to cover almost every § 1983 case and thus undermine the Supreme Court's holding in *Mitchum* that federal courts are empowered by § 1983 to enjoin ongoing state proceedings." (A32). But the unanimous *Mitchum* opinion itself made absolutely clear that *Mitchum* is not in any way "undermined" by the applicability of *Younger*; in fact, the Court *justified* its conclusion in *Mitchum* by noting that *Younger* comity principles will be fully operative precisely when § 2283 is not. 407 U.S. at 243.[10] *Mitchum* unmistakably

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9. Indeed, the State of Texas intervened as an appellant below. (A1, A3).

10. The resulting application of abstention principles in such circumstances would not in the least imperil the vitality of § 1983, inasmuch as *Younger*, like the Anti-Injunction Act itself, admits of several important exceptions. Specifically, since its first modern incarnation in the *Younger* decision, abstention doctrine has been held *not* to bar federal judicial interference in state court proceedings in the face of prosecutorial bad faith, *see Younger*, 401 U.S. at 47-48, 54, harassment by state officials, *id.*, biased state tribunals, *see Huffman v. Pursue, Ltd.*, 420 U.S. 592, 594 (1975); *see also Gibson v. Berryhill*, 411 U.S. 564, 577 (1973), or similar instances of "official lawlessness in a statute's enforcement" or "perversion of the very [state] process that is supposed to provide vindication." *Younger*, 401 U.S. at 56 (Stewart, J., joined by Harlan, J., concurring). These exceptions cover the very circumstances that were believed by the authors of the Civil Rights Act to require a federal judicial remedy that would not only operate independent *of* the state courts, but also *against* those courts: "Proponents of the legislation noted that state courts were being used to harass and injure individuals [and that] state courts were . . . [sometimes] in league with those who were bent upon abrogation of federally protected rights." *Mitchum v. Foster*, 407 U.S. at 240.

stands for the proposition that, in *real* § 1983 actions seeking to enjoin *real* state officials and agencies from litigating in state courts, *Younger* is fully applicable. Yet the court below held that, when a self-styled § 1983 action is instead brought against *private* persons, federal injunctions may be granted entirely without comity constraints. This has the perverse result of making § 1983 a far more radical instrument for federal intervention against private litigants—who are at the margins of the policies of § 1983—than against the state officials who are the central focus of those policies.

When combined, the Second Circuit's § 1983 and *Younger* holdings threaten to spawn an entirely new and populous breed of federal lawsuits aimed at the actions of ordinary citizens and corporations who happen to have garnered an enforceable judgment in a state court. Since fundamental principles of comity do not apply in the no-man's land inhabited by this species of litigation, nothing remains to prevent such lawsuits from repeatedly disrupting pending state judicial proceedings.[11] The Second Circuit's holding that *Younger* is entirely inapplicable to this case thus contravenes this Court's governing cases and creates an alarming gap in fundamental principles of comity.

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11. The Second Circuit's assault on private state court litigation cannot be limited to issues surrounding security pending appeal. The state statute books are stuffed with procedural and structural rules governing the judicial processing of private disputes, and the law reporters are filled with cases attacking the fairness and reasonableness of such rules and alleging that their enforcement would work irreparable harm. Under the Second Circuit's ruling, all these issues are easy prey to federal collateral attack during on-going state proceedings; all that is needed is a bit of artful pleading to make it appear that the federal defendant is suable under § 1983 because his invocation of state judicial proceedings—whether before or after judgment—converts him into a state actor. Since that makes the Anti-Injunction Act inapplicable and since, under the ruling below, *Younger* is also inapplicable, the road is clear for wide-scale evasions of this Court's comity rulings.

B. The Other Escape Routes Pioneered By Texaco And Endorsed By the Second Circuit Must Be Closed If *Younger* Principles Are To Be Preserved.

1. *Forecasts of Futility Cannot Substitute For A Procedural Bar.*

The Second Circuit held that, in the circumstances of this case, compliance with *Younger* requirements was also excused because the Texas state courts do not provide adequate procedures for the adjudication of Texaco's federal claims. (A35). In assessing this conclusion, it is essential to remember that, to this day, Texaco has made *no attempt whatsoever* to raise its objections to the application of the Texas lien and bond provisions in the Texas courts. The Second Circuit freely acknowledged that its dire predictions of irreversible economic harm to Texaco could not come to pass until the expiration of the stand-still order in Paragraph 7 of the judgment. (A38). Texaco thus had 3-1/2 months (A7-8 & n.3) to obtain from the trial court a ruling on the construction and constitutionality of the lien and bond provisions and, absent a favorable ruling, to seek review in the Texas appellate courts, either by expedited direct appeal or by mandamus (A10). In fact, it is "abundantly clear that appellees had an *opportunity* to present their federal claims in the state proceedings. No more is required to invoke *Younger* abstention." *Juidice v. Vail*, 430 U.S. at 337 (original emphasis). Texaco's "failure to avail [itself] of such opportunities does not mean that the state procedures were inadequate." *Id.* Yet the Second Circuit nevertheless concluded that it was unreasonable to ask Texaco initially to present its complaint about a Texas rule to the Texas court in which it was currently litigating. (A37-38).

The gravamen of Texaco's argument, accepted by the court below, is not that it could not have *raised* its constitutional challenge in the Texas courts, but that such a challenge would probably have failed since, says Texaco, none had ever succeeded in the past. The Second Circuit's conclusion about the inadequacy of Texas procedures is based on nothing more than

distrustful *speculations* about Texas law and Texas courts. Thus, the court below opined that it "appears unlikely" that Texaco "could have been assured" of a timely decision on the constitutional issues by the Texas trial court (A35), and that there was "no assurance" that the Texas appellate courts would have fixed security in an amount the Second Circuit would deem "reasonable" (A37-38). The Second Circuit further speculated that seeking relief from the bond requirement in Texas would have been futile since the rule had consistently been enforced "as written," and therefore "the Texas trial judge would in all probability deny relief sought on constitutional grounds." (A36).

This argument is as fallacious as it is familiar. The appellee in *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), like Texaco, contended that recourse to state remedies should not be required because such efforts would be "futile" and "doomed to failure." *Id.* at 610. The appellee in *Huffman* based its argument on a state case that had upheld rigid application of the statute in question but that had "absolutely nothing to say with respect to appellee's" federal constitutional challenge. *Id.* Here, Texaco and the Second Circuit rendered their verdict of "inadequate" based on Texas decisions routinely fleshing out what constitutes a "full" bond but saying *absolutely nothing* with respect to *any* sort of challenge to the bond rule, let alone a challenge along the federal constitutional lines pressed by Texaco.[12] And in *Huffman* this Court flatly rejected the proposition that the "considerations of comity and federalism which underlie *Younger*" permit the abstention requirement to be "truncat[ed]" merely "because the losing party in the state court of general jurisdiction believes that his chances of success . . . are not auspicious." 420 U.S. at 610.[13]

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12. These wholly inapposite Texas cases are collected by the court below at page A9 of its opinion.

13. Indeed, in the parallel context of federal habeas corpus, even the existence of a prior state supreme court decision rejecting the precise argument in question will not excuse a federal plaintiff's failure to first raise

The "only pertinent inquiry" is *not* how the Texas courts might rule but whether "state procedural law *barred presentation* of [Texaco's] claims." *Moore v. Sims*, 442 U.S. 415, 430, 432 (1979) (emphasis added). In the absence of such a bar, *Younger* abstention is required—and may not be evaded on the basis of self-serving predictions that recourse to the state courts would be "futile."[14] The requisite procedural barrier does not exist in this case, and the Second Circuit did not even suggest otherwise. Indeed, the only "barrier" to prompt and adequate state relief appears to be Texaco's adamant refusal to give the Texas courts an opportunity to address Texaco's challenge to the lien and bond provisions.[15] There is no

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the argument in pending state proceedings. " 'Allowing criminal defendants to deprive the state courts of [the] opportunity' to reconsider previously rejected constitutional claims is fundamentally at odds with . . . principles of comity . . . ." *Smith v. Murray*, 106 S.Ct. 2661, 2666 (1986). "[I]t is the very prospect that a state court 'may decide, upon reflection, that the contention is valid' that undergirds the established rule that 'perceived futility alone cannot constitute cause.' " *Id. A fortiori*, the Second Circuit cannot evade the demands of comity in this case by endorsing Texaco's forecasts of futility, since no court in Texas has ever considered, let alone rejected, the constitutional claims asserted by Texaco against the lien and bond provisions.

14. Texaco errs in relying on *Hernandez v. Finley*, 471 F.Supp. 516 (N.D.Ill. 1978), *summarily aff'd sub nom. Quern v. Hernandez*, 440 U.S. 951 (1979), for the proposition that something less than a "procedural bar" to raising one's federal claims will suffice to suspend the abstention requirement. (MTA 26 n.51). As this Court has itself observed, *Moore v. Sims*, 442 U.S. at 426 n.9, the three-judge court in *Hernandez* in fact found just such an absolute procedural bar to the raising of a constitutional challenge. *See* 471 F.Supp. at 519.

15. Texaco argues that it tried to "confer" with the Texas trial court about the severity of the financial crisis allegedly caused by the entry of judgment, only to be rebuffed by that court and opposed by Pennzoil. (MTA 4). Texaco fails to mention that this "conference"—which it requested on December 13, 1985, three days *after* it sought injunctive relief and appellate review of the Texas judgment in the federal district court in White Plains—would have concerned only alleged "uncertainties" in the Paragraph 7 "stand-still" arrangement, and not the state or federal constitutionality of

indication that the Texas trial or appellate courts could not have fashioned an arrangement like the stand-still order pending appeal, whether or not those courts held Pennzoil to its express stipulation in the Texas trial court that it would not invoke any alleged right, under Texas law, to demand an appeal bond in the full amount of the judgment.[16]

In fact, the Texas courts have, from the outset, stood fully prepared to consider Texaco's claim that the state's lien and bond provisions, if rigidly applied, would effectively deny Texaco its state-created right to appeal from the trial court's judgment. Indeed, the Texas Supreme Court has repeatedly and emphatically held that the "open courts" provision of that State's own Constitution, Art. I, § 13, *see* Appendix K, *requires* a Texas court to suspend the literal operation of any statutory or other condition that, as a practical matter, renders

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applying the lien and bond provisions to Texaco. (A10). Texaco also elides the fact that it submitted its "request" for this "conference" by *letter* rather than by motion or petition, as if it were litigating *in forma pauperis*, and the fact that Texaco failed to repond to requests by both Pennzoil and the Texas trial court that Texaco comply with the Texas Rules of Civil Procedure if it wished a hearing. (*See* District Court Findings Nos. 82, 85-87, A101-02).

16. The Second Circuit denigrated Pennzoil's waiver of its state-created right to a full bond as a mere "unilateral request" to the Texas trial court to determine security pending appeal by applying the standards of Fed.R.Civ.P. 62. (A48). Yet if the challenged Texas lien and bond provisions indeed operate only upon Pennzoil's "unilateral determination" (A28), it is unclear at best how the Second Circuit found any Article III "case" or "controversy" over Pennzoil's hypothetical invocation of those provisions against Texaco, since Pennzoil expressly *waived* whatever "unilateral" rights those provisions conferred upon it. Pennzoil's waiver, duly filed in the Texas trial court as a "stipulation" pursuant to Texas practice (Appendix J), is effective as a matter of Texas law to bind Pennzoil. The lien and bond provisions were intended for the benefit of judgment creditors such as Pennzoil, and their waiver obviously does not adversely affect the rights of the judgment debtor—just the opposite. *See Yandell v. Tarrant State Bank*, 538 S.W.2d 684 (Tex.Civ.App.—Ft. Worth 1976); *United Benefit Fire Ins. Co. v. Metro. Plumbing Co.*, 363 S.W.2d 843 (Tex.Civ.App.—El Paso 1962). Even the district court recognized that "consent" by Pennzoil would remove the alleged constitutional defect in the lien and bond statutes. (A68, A75).

unavailable the access to appellate courts that Texas law guarantees. Thus, in *Dillingham v. Putnam*, 109 Tex. 1, 5, 14 S.W. 303, 305 (1890), the court stated:

> "[A]n Act of the Legislature which makes the right . . . to prosecute an appeal . . . depend on the giving of a supersedeas bond, without reference to the ability or inability. . . to give such bond, is violative of the [Texas] Constitution."

See Nelson v. Krusen, 678 S.W.2d 918, 921 (Tex. 1984) (reaffirming *Dillingham*).[17]

This principle lives in Texas practice as well as theory. In *Pace v. McEwen*, 604 S.W.2d 231 (Tex.Civ.App.—San Antonio 1980), the Texas intermediate appellate court enjoined enforcement of a trial court order just ten days after entry because that order, requiring a judgment debtor to turn over real estate for sale in satisfaction of a money judgment, effectively rendered the appeal meaningless. The *Pace* court viewed its injunction as necessary to preserve its own appellate jurisdiction, *id.* at 232-33, and further held that the trial court itself had the power to grant the same injunctive relief "to prevent damage to an appellant," *id.* at 233.

The Second Circuit dismissed the Texas "open courts" guarantee and the rule announced in *Dillingham* by assuming that they protected only the abstract right to appeal as such, and could not be applied to stay enforcement of a judgment

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17. In its most recent statement on this subject, the Texas Supreme Court avowed that "state courts have not hesitated to look to their own constitutions to protect individual rights. This court has been in the mainstream of that movement." *LeCroy v. Hanlon*, 29 Tex.Sup.Ct.J. 490, 492 (July 2, 1986). In particular, the "open courts provision specifically guarantees all litigants the right to redress their grievances—to use a popular and correct phrase, the right to their day in court." *Id.* at 493-94. In *LeCroy*, the Texas Supreme Court struck down a law raising the state district court filing fee from $98 to $173 on the ground that, since $40 of the fee went to general revenue, not court-related expenses, the state had not fulfilled its burden of "show[ing] that the legislative purpose outweighs the interference with the individual's right of access." *Id.* at 494.

pending an appeal. (A31 n.12). But the *Pace* decision, which was argued to the court below, clearly demonstrates the Second Circuit's misunderstanding of Texas law. Texaco has likewise belittled the State's "open courts" guarantee and, in urging summary affirmance of the judgment below, palmed the issue in a footnote and argued that *Pace v. McEwen* actually proves that Texas remedies would have been too little, too late. (MTA 27 n.53).

Texaco's claim that Texas remedies are inadequate—a claim without which Texaco's entire case crumbles—is built upon a series of flat misrepresentations of Texas law. If Texaco and the Second Circuit had made any real effort to take the state's law seriously, they would have found that there are several expeditious avenues by which Texaco could have obtained a stay of the judgment while presenting a challenge to the lien and bond provisions.[18] *First*, like the judgment debtor in *Pace v. McEwen*, Texaco could have sought a stay of the judgment directly from the Texas Court of Appeals *without filing any supersedeas bond.*[19] Tex.R.Civ.P. 365(b) provides that "the appellate court may review for excessiveness the amount of the

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18. Texaco nowhere denies that, even without posting a supersedeas bond, it still had *3-1/2 months* in which to ask the Texas courts for relief. Texaco filed its federal injunction action on December 10, 1985—before the Texas judgment had even been *entered*—even though the stand-still agreement to which Texaco had that very day consented ensured that Texaco need fear no enforcement of the judgment or attachment of liens until mid-March of 1986. (Appendix I; A127).

19. Urging summary affirmance, Texaco told this Court that it would have had to waive its new trial motion in order to perfect an appeal and to petition the appellate court for such relief in mid-December of 1985. (*See* MTA 27 n.53). That is simply not so. It is black letter law in Texas that Texaco could have perfected its appeal by filing a very small cost bond (*not* a supersedeas bond) on the very day the trial court entered judgment, *see* Tex.R.Civ.P. 363; and "if a motion for new trial is timely filed by any party, the trial court, *regardless of whether an appeal has been perfected*, has plenary power to grant a new trial . . . ." Tex.R.Civ.P. 329b(e) (emphasis added). *See Ammex Warehouse Co. v. Archer*, 381 S.W.2d 478, 482 (Tex. 1964); *Bergman v. West*, 262 S.W.2d 435, 436 (Tex.Civ.App.—Waco 1953).

[supersedeas or cost] bond or deposit fixed by the trial court and may reduce the amount if found to be excessive." Under Texas law, "the trial court is not authorized to set a bond which would be grossly inequitable; to do so would seriously interfere and in fact often defeat the right of appellant to suspend the judgment pending appeal." *Mann-Gas Transmission Co. v. Osborn Oil Co.*, 693 S.W.2d 576, 577 (Tex.Civ. App.—San Antonio 1985, no writ).

Second, the Texas trial court itself, in the words of the Chief Justice of the Texas Court of Civil Appeals, is *also* "vested" with the power "to grant a temporary injunction to prevent damage to an appellant," when enforcement of a civil judgment would render the right to appeal "meaningless," *Pace, supra*, 604 S.W.2d at 233, 232.[20]

Third, a Texas trial court has *explicit statutory power* to "stay a judgment" if the complainant can show himself "equitably entitled to be relieved against" part or all of that judgment. Tex.Civ.Prac.& Rem.Code § 65.013. Contrary to Texaco's contention that such relief will not lie if the judgment debtor has not filed a supersedeas bond in compliance with Tex.R.Civ.P. 364 (MTA 27 n.53), Rule 364 itself, *as amended in 1984*, explicitly recognizes that in appropriate circumstances other statutes may govern the suspension of a judgment.[21] Neither the amending language to Rule 364(a) nor the "open courts" guarantee of the Texas Constitution has ever been

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20. Contrary to Texaco's recent misrepresentation in urging summary affirmance, the judgment at issue in *Pace* was *not* a "judgment . . . for recovery of specific real property." (MTA 27 n.53). The Texas appellate court there enjoined a "forced sale" of real property that had been ordered to satisfy "a *money* judgment," 604 S.W.2d at 232 (emphasis added)—precisely the sort of judgment Pennzoil has been awarded against Texaco. The case thus sounded in Rule 364(b)—the rule applicable to money judgments—and is therefore directly on point.

21. The language of the first paragraph of the rule was broadened in 1984 to provide that execution of a judgment may be suspended only by the filing of a full supersedeas bond, "[u]nless otherwise provided by law . . . ." Tex.R.Civ.P. 364 (a). Tex.Civ.Prac.& Rem. Code § 65.013 *does* "otherwise provide[ ]."

raised or addressed in any adjudication involving the Texas supersedeas bond requirement. Texaco's only authorities (*see* MTA 27 n.53) for the proposition that § 65.013 cannot be applied to mitigate the full bond requirement of Rule 364 pre-date the 1984 amendment by half a century and are in any event utterly irrelevant: neither case involved a constitutional challenge such as Texaco's; in neither case did the judgment debtor argue that the required bond would be unaffordable or unnecessary; and—contrary to Texaco's belief—neither case was governed by the "statutory predecessor to § 65.013" (MTA 27 n.53).[22]

Both Pennzoil and the Attorney General of Texas explained these state remedies at length to the court below, but they were dismissed out of hand[23] on the basis of the Second Circuit's

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22. The judgment debtors in Texaco's first authority, *Glenn v. Hollums*, 73 S.W.2d 1068 (Tex.Civ.App.—Amarillo 1934), sought to enjoin a judgment on the basis of an entirely distinct Depression-era foreclosure moratorium statute, *id.* at 1069, and the court held that "all rights in this suit which the [judgment debtors] have, if any, exist solely and alone in virture of the [moratorium] statute . . . ." *Id.* at 1070. And in *Svoboda v. Alexander*, 3 S.W.2d 423 (Tex.Com.App. 1928), which did not even involve any issue relating to a supersedeas bond, a temporary injunction against enforcement of a judgment was in fact *granted* by the trial court. *Id.* at 424. To the extent that Texas law could be read Texaco's way, *Younger* abstention would give the Texas courts an opportunity to construe ambiguous state rules so as "intelligently [to] mediate federal constitutional concerns and state interests." *Moore v. Sims*, 442 U.S. at 429-30. But in fact Texaco has yet to produce even *arguable* support for its mechanical reading of Texas law.

23. The only state remedy that the Second Circuit deigned to discuss was the possibility of a petition to the Texas Supreme Court for a writ of mandamus, Tex. Gov't Code, § 22.002(a) (1986), reprinted in Appendix N. (A36-38). The court below parsed Texas cases and statutes and found, not the absolute "procedural bar" required by *Moore v. Sims*, 442 U.S. at 430-31 n.13, but a route that offered "no assurance" that a Texas Court would fix security in what the Second Circuit deemed "a reasonable amount." (A37-38). The Second Circuit's superficial reading of Texas law errs on several counts. *First*, since the amendments of 1983, Tex.Govt.Code § 22.221(b) authorizes the intermediate appellate courts, as well as the Supreme Court of Texas, to issue "all writs of mandamus" even when their jurisdiction is not threatened. *Second*, contrary to the Second Circuit's statement (A38), a writ

assumptions (1) that the Texas courts could not act within the 3-1/2 month stand-still period and (2) that the Texas courts would, if asked, simply refuse to safeguard federal and state constitutional rights and would instead mechanically apply the supersedeas bond rule as written.[24] As to the former assumption, *Pace* confirms that the Texas appellate courts are indeed fully capable of hearing and deciding Texaco's petition for relief from Rule 364 with whatever speed might be needed.[25] And as to the latter, there is absolutely no basis for assuming that the courts of Texas, intimately familiar with this state court tort litigation, would be any less able or willing than a federal court half a continent away promptly to address and fairly to resolve all of Texaco's claims of peculiar unfairness and unique hardship.[26] Unless, of course, one starts with the

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of mandamus will issue to direct a trial court to enter a particular order providing particular relief. *Pope v. Ferguson*, 445 S.W.2d 950, 954 (Tex. 1969). The court below relied on a 115-year-old case in reaching the opposite conclusion (A38), even though that ancient case was expressly characterized as out-dated by the Texas Supreme Court in the *Pope* decision, from which the Second Circuit itself quoted at length. *Third*, the Second Circuit's conclusion that mandamus, like other proposed state remedies, would be inadequate inasmuch as Rule 364's bond requirement is mandatory and a trial court cannot fruitfully be asked or ordered to act beyond its statutory discretion, rests on a dubious premise: "it would seem an unsual doctrine . . . to say that a [state tribunal] could not construe its own statutory mandate in the light of federal constitutional principles." *Ohio Civil Rights Comm'n v. Dayton Christian Schools*, 106 S.Ct. 2718, 2724 (1986). If the supreme law of the land requires that Rule 364 be modified as applied to these facts, then a trial court of general jurisdiction certainly has the power to do so, and mandamus would certainly lie to compel that course of action.

24. In support of this prediction, the Second Circuit cited only irrelevant Texas cases routinely applying rule 364. (A9). *See* n. 12 *supra*.

25. The Texas Court of Appeals in *Pace* enjoined enforcement of a trial court judgment just ten days after it had been entered. 604 S.W.2d at 231-32.

26. As to the hardship claims in particular—e.g., the thousands who would supposedly lose their jobs were Texaco to have to post a full bond or pay its judgment in full (A40)—a Texas court, if persuaded that Texaco employees or suppliers would by some odd turn of events not be retained by a reorganized Texaco, would obviously take into account Texaco's argument

premise "that state court judges will not be faithful to their constitutional responsibilities." *Huffman v. Pursue*, 420 U.S. at 611. Such a premise is impermissible.

2. *The Only "Extraordinary Circumstances" Posed By This Case Cut* Against, *Not For, Federal Judicial Intervention.*

In defending its refusal to require federal abstention, the court below made much of the "unique and extraordinary circumstances" of this case. (A35, A38, A39-40). Texaco likewise belabors this point (MTA 25-26), obviously hoping to fit within this Court's observation that there may be cases whose "extraordinary circumstances" make abstention inappropriate. *See, e.g., Moore v. Sims*, 442 U.S. at 432-33. But that catch-phrase provides no excuse for the federal interference in state proceedings upheld by the court below.

(a) Under *Younger*, "extraordinary circumstances" permit federal intervention only if they render state judicial relief inherently inadequate.

Federal equitable intervention in state proceedings may well be appropriate upon "a showing of 'bad faith' or 'harassment' by state officials responsible for the prosecution," *Kugler v. Helfant*, 421 U.S. 117, 124 (1975),[27] or upon a demonstration

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that due process compels some bending of the lien and bond rules on such facts. Yet those dire consequences can find a comfortable home only in the imaginations of Texaco and of the court below, not in sound economic theory or in modern industrial reality. If Texaco were forced to sell assets or divisions in order to satisfy the Texas judgment, Texaco's property, far from being destroyed, would merely be transferred to new owners. And Texaco's employees, far from being thrown out of work, would merely find themselves working for a new employer. In any event, it is a strange notion of law that counsels bending principles of judicial federalism to effectuate a supposedly desirable allocation of economic resources.

27. Typical examples of such bad faith include those state prosecutions under obscenity laws, *see, e.g., Perez v. Ledesma*, 401 U.S. 82, 85 (1971), or anarchy or public disorder statutes, *see, e.g., Younger v. Harris*, 401 U.S. at 47-48; *Boyle v. Landry*, 401 U.S. 77, 80-81 (1971); *Dombrowski v. Pfister*, 380 U.S. 479, 482 (1965), in which no conviction is hoped for and in which it is the prosecution in and of itself that constitutes a constitutionally cognizable injury to First Amendment rights.

that the state law in question is " 'flagrantly and patently violative of express constitutional provisions in every clause, sentence and paragraph.' " *Younger v. Harris*, 401 U.S. at 53. Obviously, neither of those exceptions applies here.[28] But those examples reveal what this Court has definitively declared: that the underlying concern—in extraordinary as well as mundane circumstances—is with the ability of pending state proceedings to provide an adequate hearing on the complainant's federal claims. The deference to state proceedings mandated by the rules of comity and federalism may be relaxed "[o]nly if 'extraordinary circumstances' *render the state court incapable* of fairly and fully adjudicating the federal issues before it." *Kugler v. Helfant*, 421 U.S. at 124 (emphasis added); *Moore v. Sims*, 442 U.S. at 433; *Trainor v. Hernandez*, 431 U.S. at 442 n.7.[29]

The circumstances of this case, as described by the Second Circuit, are extraordinary "merely in the sense of presenting a highly unusual factual situation." *Kugler*, 421 U.S. at 125. That is manifestly insufficient to warrant a federal injunction. *Id.* Abstention is in order so long as there has been "no perversion of the very [state] process that is supposed to provide vindication," *Younger v. Harris*, 401 U.S. at 56 (Stewart, J., joined by Harlan, J., concurring), and nothing approaching that has even been alleged here.[30]

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28. The Texas lien and bond provisions are obviously not criminal statutes; and Texaco challenges them not on their face but only as applied in this particular case.

29. In *Moore v. Sims*, this Court stated that "[t]he most extensive explanation of those 'extraordinary circumstances' that might constitute great, immediate, and irreparable harm is that in *Kugler v. Helfant*, 421 U.S. 117 (1975). Although its discussion is with reference to state criminal proceedings, it is fully applicable in th[e civil] context as well." 442 U.S. at 433.

30. In any event, the existence of "extraordinary circumstances" must be assessed "at the time the state proceedings were enjoined." *Moore v. Sims*, 442 U.S. at 433. Texaco has never denied what even the Second Circuit has admitted (A7-8 & n.3): when the district court in White Plains issued its Temporary Restraining Order on December 17, 1985, Texaco had—even without posting a supersedeas bond—*three-and-a-half months* in which to

(b) Texaco's "unusual factual situation" furnishes no principled basis for distinguishing ordinary cases of judgment debtors unable to post bonds.

The court of appeals purported to limit its decision to "the extraordinary circumstances of this case, which are unlikely ever again to recur," including the large amount of the judgment and the "clear inability" on the part of the judgment debtor to comply with the superseadeas bond requirement. (A50).

It is true, of course, that the size of the judgment against Texaco is unprecedented. But it is no larger, in relation to Texaco's assets (or in relation to Texaco's tort), than thousands of judgments entered against less wealthy parties. In the only sense relevant to the debtor, it could be just as "impossible" for a "Mom-and-Pop" groeery store that had been held liable for $100,000 or even $10,000 in damages in a slip-and-fall tort action to post a bond in that amount as it is for Texaco to secure the Pennzoil judgment. Mom and Pop could easily have net illiquid assets in excess of the judgment, but be unable to post security because of a limited cash flow and the nature of their inventory and other assets. And their appeal from an adverse trial judgment would consequently be "destroyed" no less surely than Texaco claims its own to be, since Mom and Pop could, like Texaco, allege that execution of the judgment before the completion of the appeals process would leave their business—and perhaps even their lives—irreversibly altered.

Such lawsuits and such judgments, accompanied by such circumstances, are commonplace, not "extraordinary." And the Second Circuit's rationale would justify federal judicial intervention whenever a judgment debtor must post a bond—whether its size is set by statute or by a state court's discretion—large enough to threaten that debtor with the same irreversible injury that would accompany immediate execution of the judgment.

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ask the Texas courts for relief. For the stand-still agreement in Paragraph 7 of the Texas judgment, to which Texaco had consented, ensured that Texaco need fear no enforcement of the judgment or attachment of liens until March 25, 1986.

The only "unique" or "extraordinary" aspect of Texaco's case that distinguishes its situation from these more mundane scenarios is the size of the judgment against it. It is unsurprising that Texaco should plead for a different bond requirement—and a different set of abstention rules—for gargantuan corporations that are in a position to commit massive torts and, consequently, to be assessed enormous damages. What *is* surprising is that the Second Circuit should likewise endeavor to create for this case, and this case alone, a special and more favorable set of rules. For the Rule in Texaco's Case can be limited to Texaco—or to other huge companies with huge judgments against them—only by the most arbitrary and unjudicious fiat.

Indeed, the position advanced by Texaco and adopted by the Second Circuit involves a painfully obvious dilemma: if the burden the Texas bond requirement imposes on Texaco's right of appeal *were* as unprecedented and as uniquely devastating as the court of appeals evidently believed (*see* A39-40), there could be no reason short of blatant mistrust of the Texas courts to assume that those courts would mechanically and blindly apply the bond rule to Texaco's detriment. As Texaco itself stresses, its claim "does *not* attack the *facial* validity of the lien and bond provisions" but argues only "that *application* of the provisions would be irrational in the 'unique and extraordinary circumstances of this case.' (A35)." (MTA 11) (original emphasis). To *presume* that the courts of Texas will simply refuse to consider a federal as-applied challenge when those supposedly "unique" circumstances are called to their attention is unacceptable. For "[m]inimal respect for the state processes, of course, precludes any *presumption* that the state courts will not safeguard federal constitutional rights." *Middlesex Ethics Comm. v. Garden State Bar Assn.*, 457 U.S. 423, 431 (1982) (original emphasis).[31] In indulging just that presumption, the

31. As this Court wrote in *Huffman v. Pursue*:

> Appellee obviously believes itself possessed of a viable federal claim, else it would not so assiduously seek to litigate in the District Court. Yet Art. VI . . . declares that 'the Judges in every State shall be bound' by the Federal Constitution . . . . Appellee is in truth urging us to base a rule on the assumption that state judges will not be faithful to their constitutional responsibilities. This we refuse to do.

420 U.S. at 610-11.

Second Circuit manifested a disrespect for state processes that our federal system cannot abide.

III. BASIC POSTULATES OF COMITY AND THE FRAMEWORK LEGISLATED BY CONGRESS FOR THE FEDERAL JUDICIAL SYSTEM PRECLUDE STAYING STATE TRIAL JUDGMENTS, IN SUPPOSED AID OF STATE OR FEDERAL APPELLATE JURISDICTION, ABSENT EXHAUSTION OF STATE JUDICIAL REMEDIES.

The final excuse for federal intervention proffered by Texaco and the Second Circuit reveals both disdain for the Texas courts and misunderstanding of our carefully articulated federal judicial hierarchy. Texaco argued, and the courts below agreed, that staying the state court judgment pending the completion of all state appeals and of review by this Court under 28 U.S.C. § 1257 "would not adversely affect the operation of the Texas judicial system but, on the contrary, would facilitate its proper functioning by permitting Texaco's appeal to be heard and decided" (A14) and would indeed protect the "federally created right to petition for certiorari."[32] Thus, according to Texaco, federal interference with state proceedings in this case has actually "advance[d] the same interest that every *Younger* case has sought to protect" (MTA 24) and should be welcomed as an aid to this Court. A more condescending notion of federalism, and a more peculiar perspective on the federal judicial system, would be hard to imagine.

The sort of federal judicial missionary work championed by Texaco is no less offensive to state sovereignty and to principles of comity than are the intrusions sought by the most openly opportunistic of litigants. It is therefore unsurprising that, in its *Younger* line of cases, this Court has unanimously rejected the view that "federal judicial action would advance, rather than offend, 'the mutual relationship poignantly described by Justice Black as Our Federalism.' " *Kugler v. Helfant*, 421 U.S. at 129; *see also Stefanelli v. Minard*, 342

32. Texaco's Third Cause of Action, Amended Complaint ¶ 75 (CCA 331). The court below relied in part on Texaco's Third Cause of action in affirming the district court injunction. (A6, A43-44).

U.S. 117 (1951).[33] But there is no need to rely on the *Younger* line, or indeed even to hold *Younger* applicable here, to expose the fallacy of the notion that an inferior federal court may play the role of clearing the channels of appeal from a state trial judgment, and may do so unhindered by the principle that state judicial remedies must be exhausted.

Even assuming *arguendo* that the federal interference wrought by Texaco's foray to White Plains could ultimately be deemed to have enhanced Texaco's right of appeal in Texas and its right to seek review in this Court, Texaco has not denied—nor could it—that Congress has never conferred upon lower federal courts the power to displace either state tribunals or this Court in protecting either the state appellate process or this Court's appellate jurisdiction.

It is axiomatic that only the court rendering a judgment, and the courts with jurisdiction to hear appeals from that judgment, have power to process such appeals, including power to review and correct procedural barriers that are said to limit the value of those appeals—whether by issuing a stay or otherwise. By Act of Congress, this Court is the only federal tribunal empowered to review state court judgments. 28 U.S.C. § 1257. *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923). This Court is therefore the only *federal* court that has a relevant appellate jurisdiction to protect or supervise. Congress has furnished this Court with varied means to afford just such protection, *e.g.*, 28 U.S.C. §§ 1257(3), 1651, 2101(f), 2283.[34] It

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33. The federal plaintiff whose suit for injunctive relief was dismissed in *Kugler* had argued that "federal factfinding" on the admissibility in a state court of allegedly coerced grand jury testimony "would free the New Jersey courts from even the appearance of partiality . . . [and] thus assur[e] the integrity of the state judicial process without ultimately interfering with the State's right to enforce its own criminal laws . . . ." 421 U.S. at 129.

34. Implicit in the holding below is the suggestion that this Court is incapable of protecting its own appellate jurisdiction over state court judgments, and therefore is in need of aid from the federal district courts. But even if the Second Circuit were correct that, as a practical matter, the Texas courts could not or would not act on Texaco's constitutional claims with sufficient speed, Texaco would have an available remedy in this Court under 28 U.S.C. § 1257—*the very statute on which appellee bases its claim of*

is accordingly the exclusive province of this Court to decide whether, when and how to protect appellate jurisdiction over state court judgments.

As Justice Black explained for the Court in the *Atlantic Coast Line* case:

> [I]f, because of the Florida [trial court's] action, the [federal complainant] faced the threat of immediate irreparable injury sufficient to justify an injunction under usual equitable principles, it was undoubtedly free to seek such relief from the Florida appellate courts, and might possibly in certain emergency circumstances seek such relief from this Court as well. *Unlike the Federal District Court,* this Court does have potential appellate jurisdiction over federal questions raised in state court proceedings, and that broader jurisdiction allows the Court correspondingly broader authority to issue injunctions "necessary in aid of its jurisdiction."

398 U.S. at 296 (emphasis added).[35]

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right—because Texaco would then have satisfied § 1257's requirement of exhausting remedies in "the highest court of a state in which a decision could be had." *See Brown v. Texas*, 443 U.S. 47, 50 (1979). And, under 28 U.S.C. § 1651(b), a Circuit Justice of this Court could grant a stay of the judgment pending appeal through the state system and review in this Court. *See, e.g., M.I.C. Ltd. v. Bedford Township*, 463 U.S. 1341, 1342-43 (1983) (Brennan, J., in chambers). *See also Nat'l Socialist Party v. Skokie*, 432 U.S. 43, 44 (1977) (per curiam); *Nebraska Press Ass'n v. Stuart*, 423 U.S. 1319, 1327-2º (1975) (Blackmun, J., in chambers). The relief granted in *Skokie* and *Nebraska Press* was identical to that sought by Texaco here: stay of enforcement of a state court judgment to enable a state litigant to pursue a meaningful appeal.

35. The district court injunction upheld in *Henry v. First Nat'l Bank*, 595 F.2d 291 (5th Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980), stayed enforcement of a non-final state court judgment (1) awarding damages and (2) enjoining racial protests. With respect to staying enforcement of the award of damages, the injunction was not issued to preserve appellate jurisdiction over the state judgment, but in aid of a prior, never-appealed and never-dissolved injunction issued by the district court itself, which concerned bank accounts containing the funds of the state court defendant. Thus the district court's injunction issued to preserve its own, pre-existing original jurisdiction. The state court judgment "expressly authorize[d] the state court

It creates no lacuna in the scheme crafted by Congress to hold that the lower federal courts are without authority to pass on those features of state appellate procedure that are alleged to impede meaningful review of state trial judgments. If such defects *are* challenged in the state's own judicial system, this Court sits to review the outcome and to issue appropriate stays; if they are *not* challenged there, the bypass of state remedies should be deemed fatal. Until the court below held to the contrary, this was the accepted view of the courts of appeals.[36]

In deputizing the district court in White Plains as a supervisory ombudsman over Texas appeals, the Second Circuit was not merely indifferent to the virtues of exhaustion: it ruled that Texaco's deliberate bypass of the Texas judiciary *affirmatively justified* Texaco's excursion to the federal courts. (A22). The court of appeals seized upon Texaco's deliberate refusal to exhaust the appellate remedies available in the pending Texas

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plaintiffs to execute the damages award against the funds which [were] the subject of the earlier federal dispute," 595 F.2d at 307; therefore, the "only satisfactory resolution of this unseemly tension [lay] in delaying execution of the state court judgment until the prior federal injunction ha[d] been removed." *Id.*

To the extent that the federal injunction against enforcement of the state court judgment enjoining racial protests can be understood as signifying that the district court had power to preserve *appellate* jurisdiction over the state judgment, the decision's viability in the wake of the *Feldman* case is dubious. But this does *not* mean that this Court would never have had the opportunity to review and correct the state court judgment, as it ultimately did in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). For the NAACP exhausted its state appellate remedies before it filed its § 1983 action in a federal district court. 595 F.2d at 302. At that time, this Court would have had jurisdiction to consider an application for a stay of the state judgment under §§ 1257 and 1651. *See* n. 34 *supra*.

36. *See, e.g., Brown v. Chastain*, 416 F.2d 1012, 1013 (5th Cir. 1969), *cert. denied*, 397 U.S. 951 (1970) (lower federal courts have no jurisdiction to make state appellate process more meaningful by directing state court to provide a transcript to an indigent mother in a custody battle); *Ganey v. Barefoot*, 749 F.2d 1124, 1127-28 (4th Cir. 1984), *cert. denied*, 105 S.Ct. 3484 (1985) (similar facts) ("Neither the district court nor this court . . . is empowered to exercise that kind of appellate supervision of state court procedures").

litigation as rendering the *Rooker* and *Feldman* holdings wholly inapplicable to this case. Those decisions hold that only this Court has authority to review any judgment of a state court. That rule would concededly have barred Texaco from the district court if it had litigated its objections to the lien and bond rules in the Texas courts. But according to the Second Circuit's novel analysis, that barrier can be scaled by the simple expedient of failing to raise a question in a state proceeding—thereby precluding, by definition, the characterization of subsequent collateral federal district court consideration of that question as appellate "review." (A21). The court of appeals reasoned that cases such as *Monroe v. Pape*, 365 U.S. 167 (1961), and *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982)—holding that a *plaintiff* with a constitutional claim under § 1983 may, as an original matter, choose to file a federal suit rather than having to sue as a plaintiff in the state courts—also give a *defendant* in a *pending* state court proceeding the option to carve out federal issues that are unrelated "to the merits of [a state court] judgment" (A23, A41) and take them to the "concurrent" jurisdiction of a federal court (A21-22).

What had been vice thus became virtue: the very same failure to exhaust state procedures and appeals that would have all but doomed a stay application by Texaco to *this* Court pursuant to 28 U.S.C. § 1651 was viewed by the Second Circuit as providing Texaco a privileged entree to a federal *district* court under § 1983.[37] The ruling below thereby arrogates to the lower federal courts even more power to intercede in state appeals than this Court possesses under §§ 1257 and 1651, thus

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37. The Second Circuit's inversion of traditional exhaustion reasoning is all the more bewildering in the wake of this Court's opinion in *Feldman*. There the Court dealt with the bypass issue and concluded that bypassing the state courts did *not* authorize otherwise impermissible federal court litigation:

> [T]he fact that we may not have jurisdiction to review a final state-court judgment because of a petitioner's failure to raise his constitutional claims in state court does *not* mean that a United States district court should have jurisdiction over the claims. *By failing to raise his claims in state court a plaintiff may forfeit his right to obtain review of the state-court decision in any federal court.*

460 U.S. at 482-84 n.16 (emphasis added).

reconstituting the district courts as more potent and inviting fora in collateral proceedings than this Court on direct review.[38]

There is no authority whatever for the Second Circuit's proposition that *Rooker-Feldman* precludes only district court review of substantive claims concerning the merits of a state case and not consideration of the numerous procedural and structural issues posed by the processing of state litigation. Under 28 U.S.C. § 1257, this Court reviews "judgments or decrees," not claims or issues; the enforceability of the judgment obtained by Pennzoil in Texas is the very matter that the courts below purported to review, and the very matter that those courts stayed.[39] To say that a judgment is not "inextricably intertwined," *Feldman*, *supra*, 460 U.S. at 482-83 n.16 (quoted at A22-23), with its enforcement is not so much to draw a line as to fantasize one—and a wholly artificial one at

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38. The holding below obviously makes federal forum shopping enticing indeed. It is also completely inconsistent with myriad decisions of this Court encouraging state court litigants to give state courts an initial opportunity to resolve all questions, *see*, *e.g.*, *Sumner v. Mata*, 449 U.S. 539, 549 (1981); *Allen v. McCurry*, 449 U.S. 90, 105 (1980); *Huffman v. Pursue*, 420 U.S. at 603-09, and with the system devised by Congress for the orderly raising of federal questions in pending state court litigation, with review first in the state courts and ultimately in this Court.

39. Before the decision below (A22-23, A27), the federal courts of appeals had not supposed that the *Rooker-Feldman* doctrine may be limited to instances in which a federal court is literally asked to reverse the result of a state court adjudication—a limitation that would reduce the doctrine to one of mere issue preclusion. *Compare Feldman*, 460 U.S. at 488-90 (Stevens, J., dissenting). *See*, *e.g.*, *Hale v. Harney*, 786 F.2d 688 (5th Cir. 1986) (applying *Rooker-Feldman* to uphold dismissal of § 1983 complaint, where challenge to constitutionality of parts of Texas Family Code had *not* been raised in state divorce proceedings but could have been, even though federal plaintiff insisted that review of the *merits* of the state court judgment against it was being sought only in its state court appeal and that its federal complaint independently challenged several discrete provisions of Texas law); *Thomas v. Kadish*, 748 F.2d 276, 282 (5th Cir. 1984), *cert. denied*, 105 S.Ct. 3531 (1985) ("deliberate bypass of those procedures that envisioned (ultimately) a reviewable final state-court judgment, itself under *Feldman* not subject to federal district court review, should not . . . entitle the [plaintiff] to a review of his constitutional claims by a federal district court that would have been unavailable to him if he had pursued his claim to final state court judgment").

that. And to say that lower federal courts, while powerless to *review* state court judgments pending appeal, remain free to *enjoin enforcement* of those same judgments pending those same appeals, is to split fine philosophical hairs indeed. A judgment which the judicial system is not free even to consider enforcing or securing pending appeal is a judgment in name only.

By order of a federal district court, Pennzoil's judgment against Texaco has been reduced, throughout the appellate process in Texas and in this Court, to a piece of paper signifying only an empty declaration of abstract rights, except to the degree the federal court deems it reasonable to secure that judgment—a determination that itself cannot be made without evaluating the state court judgment.[40] Under *Rooker-Feldman*, the district court was therefore without jurisdiction to consider Texaco's request for such relief.

But even if *Rooker* and *Feldman* were read so narrowly that the district court could be said to have had subject matter jurisdiction in this case, the court below nevertheless erred in not directing the district court to impose an exhaustion requirement on Texaco's challenge to the Texas lien and bond provisions. *See* n.37 *supra*. For, by focusing on the narrow factual context of *Feldman*, the Second Circuit failed to probe beneath the surface for the principles of comity that provided the substructure for what this Court held. The core of this Court's comity jurisprudence is the proposition that

> [f]ew public interests have a higher claim on the discretion of a federal chancellor than the avoidance of needless friction with state policies, whether the policy relates to the enforcement of the criminal law, or the administration of a specialized scheme for liquidating embarrassed busi-

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40. The district court required security in the amount of $1 billion, based on its "review [of] the Texas trial and judgment on the merits (but without benefit of the trial record)" (A47). The Second Circuit deemed this procedure "clearly erroneous" (A47), but went on to survey for itself Texaco's state and federal challenges to the Texas judgment, declaring them "non-frivolous" (A42). The court of appeals then upheld the injunction and declined to remand to the district court for a proper "application of equitable principles" (A47-48), since the "facts relied upon by us in our foregoing analysis are undisputed" (A47).

> ness enterprises, or the final authority of a state court to interpret [state law].

Railroad Comm'n v. Pullman Co., 312 U.S. 496, 500 (1941) (Frankfurter, J., for the Court) (quoted in *Moore v. Sims*, 442 U.S. at 428).

Since the Texas policy for accomodating the interests of judgment debtors and creditors pending appeal is certainly entitled to comity, and since the injunction upheld below undeniably interfered with that policy, the Second Circuit cannot escape comity principles by insisting that it has not reviewed, or interfered with proceedings on, the *merits* of the Texas judgment, but "only" enjoined any and all state proceedings to *enforce* that judgment or to *arrange security* for it pending appeal (A23, A35). It made no difference in *Juidice v. Vail* that the federal plaintiff sought to enjoin "only" an ancillary contempt proceeding, not the debt action itself nor even the judgment collection process. *See* 430 U.S. at 329-31. And in *Trainor v. Hernandez*, comity was held to bar federal interference even with an attachment proceeding that was merely incidental to the underlying fraud action. 431 U.S. at 446 n.9.[41] Thus, in insisting that its decision "does not displace any state court adjudication" (A23)—and therefore supposedly is not barred by *Rooker-Feldman*—the court below overlooked the fact that its decision *does* displace the Texas appellate courts and this Court as guardians of state appellate process and of this Court's appellate jurisdiction, and thereby undermines the very pillars of federalism that *Rooker-Feldman* sought to buttress.

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41. Texaco's bald assertion, when urging summary affirmance, that *Younger* comity principles apply only to cases where "the federal plaintiff sought to stop an ongoing state proceeding in its tracks" (MTA 24), thus dissolves upon a quick review of the federal reporters. *See also, e.g., Kenner v. Morris* 600 F.2d 22 (6th Cir. 1979) (federal court may not enjoin state divorce court from following discriminatory alimony statute in awarding *pendente lite* support payments); *Neebuhr v. Bayer*, 502 F.Supp. 1216 (N.D. Ohio 1980) (may not reinstate plaintiff's state court tort action); *Gras v. Stevens*, 415 F.Supp. 1148 (S.D.N.Y. 1976) (three-judge court) (Friendly, J.) (may not protect state court divorce plaintiff from discriminatory statute requiring him to pay defendant's state court counsel fees and costs); *Kahn v. Shainswit*, 414 F.Supp. 1064 (S.D.N.Y. 1976) (federal court may not force state courts to allow divorce defendant to present an adultery counterclaim).

The finality and exhaustion rules that limit this Court's consideration of applications to stay enforcement of state judgments—rules that would concededly have made Texaco's refusal to raise its federal challenge in the pending Texas proceedings a bar to interim relief in this Court on direct review—are, after all, more than mere guides to " 'good judicial administration.' " *North Dakota Pharmacy Bd. v. Snyder's Drug Stores*, 414 U.S. 156, 159 (1973). They are mechanisms carefully designed to "avoid[ ] piecemeal review of state court decisions . . . and to leave at a minimum federal intrusion in state affairs." *Id.* Thus, even if the Second Circuit were correct that Texaco's deliberate bypass of the state courts circumvents the precise holding of *Feldman*, it is beyond cavil that Texaco's flanking maneuver has entailed both "piecemeal review" of state court proceedings and "federal intrusion in state affairs." Just as "all the evils at which *Younger* is directed . . . inhere in federal intervention prior to completion of state appellate proceedings, . . . as surely as . . . if such intervention occurred at or before trial," *Huffman v. Pursue*, 420 U.S. at 608, so all the evils at which *Feldman* is directed inhere in federal district court resolution of issues surrounding the enforcement and securing of a state court judgment, as surely as if the district court presumed to resolve the merits of the judgment itself.

In sum, the Second Circuit impermissibly treated a federal district court stay in aid of appellate jurisdiction as an exercise of original jurisdiction exempt from exhaustion requirements. The same mode of analysis would permit piecemeal shopping trips to federal fora on other procedural and structural issues that can readily be labeled "collateral" and made the basis of supposedly independent causes of action under § 1983. The judgment below thus invites state court litigants to carve issues out of pending cases and cart them to a federal district court in search of what they perceive to be a more favorable resolution. Despite admonitions from this Court that federal courts must be even " 'more reluctant . . . to intervene piecemeal to try collateral issues,' " *Kugler v. Helfant*, 421 U.S. at 130, the Second Circuit would allow litigants to assemble jurisdictional sandwiches to suit their tastes—a state slice here, a federal slice

there. This a la carte approach to federal-state judicial relations is utterly unpalatable and wholly alien to Our Federalism.

IV. THE JUDGMENT BELOW PREMATURELY SECOND-GUESSES A REASONABLE ACCOMMODATION OF ECONOMIC INTERESTS AND REDUCES THE STATE COURT'S JUDGMENT TO AN EMPTY DECLARATION OF ABSTRACT RIGHTS.

If this Court agrees that the courts below violated controlling principles of federalism for any of the three related but independent reasons advanced in Parts I, II, and III, *supra*, it need read no further, for the judgment below must then be reversed. But that judgment would be insupportable in any event. For, reaching a due process claim it should have left to the state courts, the Second Circuit incorrectly held that the Due Process Clause guarantees judgment debtor Texaco an affordable bond and entitles it to retain, in unencumbered form, the fruits of its tortious conduct pending appeal—as if the Texas trial court had never rendered a judgment at all. While conceding the legitimacy of protecting a judgment creditor's interests pending appeal (A35; MTA 11), the court below held (A44) and Texaco argues here (MTA 11) that it is irrational and thus unconstitutional for Texas to apply its security rules in this particular case.

The court below embraced Texaco's claim under § 1983 that conditioning a stay of execution on Texaco's posting of a $12 billion supersedeas bond "would at least amount to a deprivation of [Texaco's] property in violation of its right to due process" (A24), since such a bond could force Texaco into bankruptcy "by the time its appeals were decided" (A44), thereby rendering its appeal a "meaningless ritual." (A44).

It is conceded by all that due process does not require a state to provide an appeal, *Lindsey v. Normet*, 405 U.S. 56, 77 (1972); *Ohio v. Akron Park District*, 281 U.S. 74, 80 (1930), but does prohibit states from imposing irrational or arbitrary requirements on the appellate opportunities they choose to make available. *Evitts v. Lucey*, 105 S.Ct. 830, 840 (1985). The State of Texas has not, of course, limited Texaco's appeal rights as such: Texaco's appeal was argued and submitted to

the Texas Court of Appeals on July 31, 1986, and prosecution of that appeal did not and does not now depend upon the posting of any security for the judgment, upon obtaining a stay of the judgment's execution, or upon a suspension of the Texas judgment lien provisions. What Texas *has* done, by adopting a general rule that ordinarily requires a judgment debtor like Texaco to post a bond in the full amount of the judgment as a condition of a stay, is presumptively to prefer (1) full protection for the winning party against the risk of partial or complete uncollectibility should the trial judgment ultimately be affirmed, over (2) full protection for the losing party against the risk of interim harm that may prove impossible to undo in its entirety should the trial judgment ultimately be reversed.

There is no basis for Texaco's assumption that this general rule would in fact be applied to require a full bond of Texaco, rather than fine-tuned in light of the facts at hand, since the injunction sought by Texaco and upheld by the court below has prevented the Texas courts from even addressing this question. But, even assuming that Texas courts would indeed decline to adjust the lien and bond rules to the degree Texaco deems warranted on these facts, there would be nothing in the least "irrational" in a decision to favor the security interests of Pennzoil as a victorious plaintiff over those of Texaco as a judgment debtor. Nor would it be the least bit "arbitrary" for Texas to deem the completion of the trial in this case a watershed, and to use that event as the basis for significantly readjusting the relative situations of the parties. For states are surely free to strike their own balance between the interests of judgment creditors and those of judgment debtors.

Under the Due Process Clause, state treatment of trial court judgments can run the gamut from denying any appeal at all, thereby making trial determinations final and completely dispositive, to granting the appellant a right of completely *de novo* review, thereby making challenged trial judgments mere triggers for virtual retrials of the facts and law. Within that broad spectrum, a state's policy on enforcement of or security for money judgments pending appeal may range anywhere from requiring immediate payment of damages, thereby making the appellant fight literally to get its money back, all the way to granting an automatic stay of execution, without any

security, upon the filing of a notice of appeal, thereby leaving the appellant entirely free to encumber or transfer assets and exposing the appellee to the unmitigated risk that its judgment will prove uncollectible even if upheld on appeal. To concede, as Texaco (MTA 10–11) and the Second Circuit (A43) do, that an appeal could constitutionally be dispensed with altogether, while insisting that, if an appeal is made available, the state is compelled to opt for a point nearer the end than the beginning of this wide spectrum, is nonsensical.[42]

As one might expect, the appellate rules of the states are scattered across the entire range of options. Thus, a handful of states in New England favor the debtor by providing for an unsecured, automatic stay of execution upon appeal.[43] Some 30 other states, including Texas, have decided that, once a trial is complete, the judgment creditor is presumptively entitled to a supersedeas bond equal to or greater than the judgment, as assurance that the creditor will be able to collect the award (and interest) if it is ultimately affirmed.[44] Nothing in the Due

42. It is not as if the state's refusal to grant Texaco, along with other judgment debtors, a stay of judgment in this case would independently violate some constitutional norm, or would make a constitutionally invidious distinction—as might be the case, for example, if stays of enforcement were available to everyone but the poor, or if access to a "meaningful" appeal were contingent upon wealth. *Cf. Douglas v. California*, 372 U.S. 353 (1963) (unconstitutional to refuse to pay for appellate counsel for indigents); *Williams v. Oklahoma City*, 395 U.S. 458 (1969) (refusal to waive cost of trial transcript for indigent). On the contrary, it is the special rule for billion-dollar multinational corporations and their billion-dollar torts, proposed by Texaco and adopted by the court below, that invidiously discriminates among judgment debtors. Nor does applying a rule favoring trial winners over judgment debtors even remotely resemble a decision to render an appeal ineffectual by allowing ineffective assistance of counsel to squander a criminal defendant's appeal, *see Evitts v. Lucey*, 105 S.Ct. 830 (1985); or a decision to allow a clerical snafu to obliterate forever a civil plaintiff's administrative cause of action, *see Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). Thus, nothing in this Court's prior cases supports the invalidation of the accommodation Texas has made between the interests of parties pending appeal.

43. Rhode Island, Connecticut, Maine, Massachusetts, New Hampshire, and Vermont. (Relevant citations are collected at JS 25 n.16).

44. Of these, the law in 11 states in addition to Texas requires the posting of a full bond: Alabama, Arkansas, Delaware, Iowa, Louisiana,

Process Clause empowers a federal court to arrogate to itself the authority to countermand that state policy choice simply because the federal tribunal might strike the balance differently or come to a different conclusion about the size of the threat to the judgment creditor's interests or the importance of minimizing that threat.

Until the ruling below, it was well established that a civil litigant, however sympathetic its case, has no due process right to be free from the execution of a judgment pending its appeal. In fact, this Court has expressly so held. In *National Union of Marine Cooks & Stewards v. Arnold*, 348 U.S. 37 (1954), a judgment debtor refused to file a bond protecting the judgment creditor pending appeal and, in order to "safeguard the collectibility" of the judgment, the state court dismissed the debtor's appeal. *Id.* at 41. This Court concluded that there had been no violation of the Due Process Clause. *Id.* at 44. *A fortiori* Texaco, with its right to appeal unrestricted by the Texas bond and lien provisions, has no right to be free from security requirements *pending* that appeal. There is simply "no obligation upon the State to provide for suspension of judgment" pending whatever appeal process it has made available. *Louisville & Nashville Railroad Co. v. Stewart*, 241 U.S. 261, 263 (1916).

However a state chooses to strike the balance between judgment creditors and debtors, that substantive legislative

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Michigan, Minnesota, Nebraska, New Mexico, Oklahoma, and South Dakota. Nineteen jurisdictions have laws presumptively requiring a full bond, but explicitly allowing the trial court some equitable discretion to reduce the size of the bond: Alaska, Arizona, District of Columbia, Georgia, Idaho, Indiana, Kansas, Kentucky, Maryland, Mississippi, Missouri, New Jersey, New York, Oregon, Pennsylvania, Tennessee, Virginia, Washington, and Wyoming. (The relevant citations are collected at JS 26 n.17). Such provisions cannot distinguish the rule in those 19 states from the rule at issue here. For the nub of Texaco's complaint here must be that the *the particular bond demanded in this case* would unjustifiably work the same injury pending appeal as immediate execution of Pennzoil's judgment. Were a $12 billion bond to be set in the discretion of a Texas judge after a full hearing, Texaco's due process theories would still allow it to claim a violation of its constitutional rights on the ground that, given Texaco's net worth, the lack of a full bond poses no real risk to Pennzoil and the requirement of such a bond therefore "eviscerate[s]" Texaco's "right to appeal . . . without advancing the state interest at issue." (MTA 11).

choice ought to be respected by federal courts—subject, at the most, to invalidation if it fails the test of minimum rationality. "At least since the demise of the concept of 'substantive due process' in the area of economic regulation, this Court has recognized that '[l]egislative bodies have broad . . . [discretion] to subordinate the . . . rights" of some economic actors "to the conflicting rights" of others. *New Motor Vehicle Bd. v. Fox*, 439 U.S. 96, 107 (1978); *id.* at 112 (Marshall, J., concurring). Even in the heyday of searching review of economic legislation, not a single Justice of this Court saw any constitutional infirmity in a rule requiring a supersedeas bond equal to 110% of the judgment. *Louisville & Nashville Railroad Co. v. Stewart, supra*, 241 U.S. at 263. And, "[o]nce having enacted a reasonable general scheme . . . [a state] [i]s not required to provide for a prior individualized hearing each and every time the provisions" of the scheme adversely affect a given party, *New Motor, supra*, 439 U.S. at 108. *See also Weinberger v. Salfi*, 422 U.S. 749, 772-74, 776-77, 782-83 (1975); *Dandridge v. Williams*, 397 U.S. 471, 484-85 (1970).

Lurking behind the Second Circuit's ruling is the premise that, because of the circumstances of this case, Texaco is entitled as a matter of federal law to avoid, pending appeal, the consequences of its trial loss—in effect, to proceed with business as usual, almost as though the Texas trial court had never entered a judgment against Texaco. The court below essentially held that, on this record, the Texas judicial system has no claim at all in the matter until all appeals within and from that system have been exhausted. To state that contention is to refute it: the most elementary axioms of respect for state judicial proceedings prevent federal courts from *ever* reducing state court judgments, throughout the pendency of the state appellate process, to empty declarations of abstract rights—like so many "bequest[s] in a pauper's will," *Edwards v. California*, 314 U.S. 160, 186 (1941) (Jackson, J., concurring).[45]

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45. As Texaco itself concedes—and as this Court has held—"a state court has 'inherent power to use its processes to induce compliance with a supplemental order reasonably issued in aid of execution' " when, *during the pendency of an appeal*, " 'the effectiveness of a money judgment is jeopardized by the judgment debtor.' " (MTA12 n.22) (quoting *Nat'l Union of Marine Cooks & Stewards v. Arnold*, 348 U.S. 37, 44 (1954)).

The court below seemed to recognize that the legitimacy of such intervention is extraordinarily dubious, for it went to great lengths to insist that injunctive relief was necessary here because the Texas courts were supposedly unable and unwilling to grant Texaco interim relief from the Pennzoil judgment. (A35, A50-51). Yet for all we know, the courts of Texas might well have suspended the trial judgment on these facts without requiring a full bond—*if Texaco had only asked. See* Part II., *supra*.

We return, therefore, to the very center of this case: the proper place for Texaco to have raised its claims against the rigid enforcement it feared was in the Texas courts and, if its claims were rebuffed there, in this Court on direct review. Texaco's deliberate bypass of state avenues of relief that might have promptly mooted the entirely hypothetical due process argument it presses upon this Court does not entitle it to a decision on the merits of that argument.

CONCLUSION

For the several independent reasons presented above, the judgment below must be reversed.

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